IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 162

J. L. GREENE AND HAZEL McCORMICK GREENE, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

AND SUPPORTING BRIEF

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on March 15, 1944.

Opinions Below

The Memorandum Opinion of The Tax Court of the United States (R. 39-45) is unreported. The Opinion of the Circuit Court of Appeals (R. 101-107) is reported at — Fed. (2) —.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered March 15, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13, 1925.

Question Presented

Were certain undeveloped oil and gas leases, royalty interests, and fee lands, which petitioners sold in 1938 and 1939, held by them primarily for sale to customers in the ordinary course of a trade or business, and excluded from the term "capital assets" as defined by Sec. 117 of the REVENUE ACT OF 1938? (p. 13).

Statement

Petitioners are husband and wife and they reside in Midland, Texas. Petitioner J. L. Greene is a licensed broker and maintains an office at Midland, Texas (R. 53). From time to time he has purchased unproven oil properties for his own account. During 1938 and 1939, Greene sold certain of the oil and gas leases, royalty interests, and two parcels of fee lands which he had previously purchased. The question before The Tax Court was whether the gains on such sales were short-term capital gains taxable to the extent of one hundred per cent, as determined by the respondent, or whether the gains were long-term capital gains, less than one hundred per cent of which are to be taken into account in computing net income. All of the properties had been held for the required length of time for the gain to qualify as long-term capital gains, but the respondent determined that the properties were held by Greene primarily for sale to customers in the ordinary course of his trade or business and were there-

fore excluded or excepted from the term "capital assets," as defined by Sec. 117(a)(1) of the REVENUE ACT OF 1938 (p. 13, R. pp. 54-55).

The properties were acquired under these circumstances. Since 1931, Greene has been chiefly occupied in purchasing oil and gas leases for major oil companies. The oil companies generally gave Greene orders to buy leases for them in a given area. Greene would purchase the leases in his own name and when titles were approved the leases would be transferred to the oil companies for whom they were purchased. The funds used by Greene to purchase the leases were supplied by the oil companies and he received a commission for his services in acquiring the leases. Greene had no actual interest in the leases so acquired, it being a common practice in the industry for large oil companies to have an individual buy leases for them and take title in his own name (R. 54). Buying leases for others was Greene's main means of livelihood.

As is usual among men thrown in contact with the oil business, Greene purchased some leases and royalty interests for his own account. Among these were the leases and interests which he sold in 1938 and 1939, and which gave rise to this controversy. Greene did not acquire the leases and royalty interests with the purpose or motive of offering them for resale and he had no person or persons in mind to whom he might sell or offer to sell a given property at the time he bought it. He did not know what he would do with the properties when he bought them. Disposition depended upon the approach or proximity to the properties of drilling or other exploratory operations and the results indicated thereby. Greene testified that, depending on circumstances, like any owner of leases exercising attributes of ownership, he might drill and operate a lease himself (he did drill eleven wells on properties in which he held an interest), or he might "farm out" a lease for another to drill, or he might sell a lease or

property if the facts, in his judgment, indicated it should be sold, or that he might abandon or forfeit a lease by failing to pay the rent thereon when it fell due (R. 54-55). The record shows that Greene abandoned six leases and one royalty interest in 1938 which had cost him $959.12 (R. 73-74), and an undisclosed number of leases in 1939 which had cost him $7,409.20 (R. 87).

As an example of his operations, Greene in his testimony cited a royalty interest in Gaines County, Texas, which he acquired in March, 1934, and sold in October, 1938. He testified that he did not have a customer in mind that he was going to sell the royalty to when he acquired it; that he did not know a "single human being to whom he would even offer it for sale;" and that he had no such purpose or motive in mind when he acquired the interest. He further testified that he sold the property when he thought it advantageous because there was a well closely offsetting it which was low on the structure, and which he thought would be so small that "it would not be worth very much" (R. 54-55). Greene further illustrated his operations by assuming that he had purchased a "wildcat" lease or two in Gaines County, Texas, which had some wells close by. If the wells did not look good to him and he could get a buyer for the leases, Greene testified he would sell them; and if he could not get a buyer, he likely would forfeit the leases by not paying the rentals. He testified that these circumstances applied to all of the properties which he purchased and that in determining what to do with a given lease or other property he would be governed by the turn of events occurring after he acquired it (R. 55-56).

The above statement is taken from the evidence given at the hearing before The Tax Court. Greene was the only witness before The Tax Court. His testimony was not contradicted or disputed and no countervailing or rebutting

evidence was offered or received on behalf of the respondent. The Tax Court upheld the respondent's contention that the properties sold by Greene in 1938 and 1939 were held by him for sale to customers in the ordinary course of a trade or business and they were therefore excluded from the term "capital assets," as defined by Sec. 117(a)(1) of the REVENUE ACT OF 1938 (R. 39-45). The Circuit Court of Appeals, with one Judge dissenting, affirmed the decision of The Tax Court (R. 101-107).

Specification of Errors to Be Urged

1. The provision in the Revenue Laws for taxing capital gains at lower rates than ordinary income is taxed were "adopted to relieve the taxpayers from these excessive tax burdens on gains resulting from a conversion of capital investments and remove the deterrent effect of those burdens on such conversion." BURNET v. HARMEL, 287 U.S. 103, and HOUSE REPORT NO. 350 WAYS AND MEANS COMMITTEE, 67th Congress, First Session, on the Revenue Bill of 1921 (p. 14). Statutes providing for relief to taxpayers should be liberally construed so as to accomplish the result which Congress intended. BONWIT TELLER & CO. v. U. S., 283 U.S. 258; KEEBLE, JR., v. COMMISSIONER, 2 T.C. —No. 148; SLOUGH, ET AL., v. COMMISSIONER, 3 T.C.—No. 73. In upholding the decision of The Tax Court that the properties in question were held primarily for sale to customers in the ordinary course of a trade or business, the courts below resolved all doubts against the petitioners and gave no consideration to the fact that Sec. 117 is a relief measure. Their decisions are in conflict with the rule announced by this Court in BONWIT-TELLER & CO. v. U. S. supra, for the construction of relief measures.

2. The Circuit Court of Appeals erred in finding that the

taxpayers admitted being in the business of buying and selling oil properties and in drawing from such alleged admission the inference that the properties in controversy "must have been held primarily for sale to customers in the ordinary course of business." The only admission made by petitioners was that they were engaged in a trade or business (R. 43). Such admission was made in their Tax Court brief. *Nowhere did the taxpayers admit that they were engaged in buying and selling oil properties as a business.* Consequently the court decided the case against the taxpayers on an erroneous premise.

3. The Circuit Court of Appeals erred in upholding the decision of The Tax Court for the reason that there was no evidence to support the finding of that court that the properties were held primarily for sale to customers in the ordinary course of his trade or business. The uncontradicted and undisputed evidence completely negatived the respondent's determination that the properties in controversy were held for sale to customers in the course of a trade or business.

4. The Circuit Court of Appeals should not have limited its consideration of the case to the question of whether there was any substantial evidence to support the findings of The Tax Court. A question of law was involved which should have been passed on by the Circuit Court.

5. The evidence showed that the properties were purchased for investment purposes; that disposition or use was governed by facts and circumstances occurring after they were acquired; and that they could not have been held for sale to customers in the course of a trade or business.

Reasons Relied Upon For Granting The Writ

FIRST. The question presented is of such great general

interest that it transcends the individual case. A large segment of the taxpaying public is affected. People in most every walk of life, such as lawyers, doctors, bankers, brokers, insurance men, and the like, who have been thrown in contact with the oil industry, have invested some of their savings and capital in leases, royalty and mineral interests, proven and unproven, and real estate in general, with the hope and expectation that values will increase and profits will be realized through conversions. When do these purchases become stock in trade? When two or a dozen leases or farms are purchased? Or when purchases and sales are numerous and frequent and the volume large? Or is the purpose and intent in purchasing a property the controlling factor? The respondent has often taken the position that a property represents stock in trade if a gain is involved and a capital asset when a loss is claimed on the sale. Property owners do not know where they stand. They hesitate to make sales which they could advantageously make because they do not know whether the properties will be regarded as capital assets or stock in trade by the taxing authorities and the courts. The amount of tax payable as a result of a sale of property is the dominant factor to consider in determining whether to sell or not to sell. This court has never passed on the provision of Sec. 117 which excludes from the operation of the statute gains from the sale of property held primarily for sale to customers in the ordinary course of a trade or business. An authoritative decision by this Court as to the meaning, scope, and application of the provision would do much to clear up the confusion and uncertainty which now exists in the minds of property owners and to remove the deterrent effect which the lower court decisions and the inconsistent positions taken by respondent has had on property sales.

SECOND. In the particular case, The Tax Court and the Circuit Court of Appeals erred in not construing the relief

statute (Sec. 117) liberally in favor of the petitioners and their decisions are in conflict with the principles announced by this Court in BONWIT TELLER & CO. v. U. S., supra.

THIRD. The Circuit Court of Appeals misread the record in these cases. It assumed that the record showed that the taxpayers admitted they were engaged in the business of buying and selling oil properties. There is no such admission in the record. The decision of the Circuit Court of Appeals was predicated largely on the erroneous assumption that the taxpayers made the said admission and an injustice and hardship will be worked upon the petitioners unless the error made by the Circuit Court of Appeals is corrected by this Court.

FOURTH. There was no evidence before The Tax Court to support its finding that the properties were held primarily for sale to customers in the ordinary course of trade or business. On the contrary, the evidence was implicit that the properties were not held for the interdicted purpose. Therefore, the Circuit Court of Appeals should have reversed the decision of The Tax Court instead of affirming it.

FIFTH. There is an apparent conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case and the decision of the Circuit Court of Appeals for the Second Circuit in TAYLOR v. COMMISSIONER, 76 Fed. (2d) 904.

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BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

In J. L. Greene and Hazel McCormick Greene, Petitioners, v. Commissioner of Internal Revenue, Respondent

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Points Relied Upon

1. Section 117 of the Revenue Act of 1938 is a relief statute and is to be liberally construed in favor of taxpayers in order to afford them the relief it was intended to provide.

2. The petitioners did not admit that they were engaged in the business of buying and selling oil properties as a business, as determined by the Circuit Court of Appeals.

3. There was no evidence to support the decision of The Tax Court, and for this reason it should have been reversed by the Circuit Court of Appeals.

4. A question of law was involved which should have been passed on by the Circuit Court of Appeals.

5. The fact that the properties sold were not producing income does not prove they were held primarily for resale.

6. There was no proof that petitioners had neither the capital nor the inclination to hold for investment more than a chosen few of the properties acquired.

7. The "volume of sales" test applied by The Tax

Court in deciding that the properties were held for resale is not a proper guide for determining the question.

8. The sales were not made to "customers" in the sense that word is used in the statute.

9. The only reasonable conclusion that could have been drawn from the evidence was that the properties were held for investment and not for resale.

Summary of the Argument

1. Section 117 is a relief statute and is designed to relieve taxpayers from the burden of excessive and prohibitive surtaxes when a capital asset which has increased in value over a period of years is disposed of in a given year. The petitioners fit into the class of taxpayers to which the capital gain provisions were intended to afford relief. They sold mineral properties, which, in most instances, had been held for more than two years, and the gain which had accrued over the years was all realized in one year. They will be subjected to excessive surtax burdens unless the gain on the sales is treated and taxed as long-term capital gain. The Tax Court resolved the doubts in the respondent's favor by permitting the presumption of correctness of his determination to balance the scales in his favor. The doubts, if any, should have been resolved in favor of the petitioners.

2. The Circuit Court of Appeals affirmed the decision of The Tax Court on the assumption that the petitioners admitted being in the business of buying and selling properties. Petitioners made no such admission, and since the decision of the Circuit Court of Appeals was predicated largely on the supposed admission, its decision should not be allowed to stand by this Court.

3. The petitioners showed in the Circuit Court that the inference drawn by The Tax Court that the properties were held primarily for sale was not warranted by any substantial evidence and for this reason the decision of The Tax Court should have been reversed and remanded on the appeal below.

4. The question of whether the properties were held primarily for sale to customers in the ordinary course of trade or business was a question of law, and the Circuit Court of Appeals not only had the right to review the decision of The Tax Court, but it was its duty to do so under Section 1226 of the U. S. CODE and determine whether the decision of The Tax Court was in accordance with the law.

5. The fact that the properties had not been developed to the point of production at the time they were sold by petitioners is no proof that they were held primarily for sale. Many taxpayers invest their funds in unimproved real estate in the expectation that it will increase in value, without any prospect of the property producing any immediate income. The properties sold by petitioners in 1938 and 1939 were not of comparatively recent origin, as suggested by the Circuit Court of Appeals, because most of them had been held for more than two years at the time of sale; however, if it could be said that they were recently acquired, this would not be any proof that they were held for resale. The motive and purpose in purchasing any property is the test rather than the length of time it is held. Ordinarily, persons acquiring goods, wares and merchandise for resale expect a quick turnover and do not customarily hold their goods in stock for two, three, four, or more years, as was the case with the properties acquired by the petitioners. If the length of time has any bearing on the purpose for which the properties are held, the fact that petitioners held the properties for such a long time

before they were sold would indicate that they were not held for resale.

6. The record fails to support the statement made by the Circuit Court of Appeals that petitioners had neither the capital nor the inclination to hold for investment more than a chosen few of all the properties which they acquired. Petitioner testified that he was attempting to build up his oil producing business, but that he would sell a given lease if nearby development suggested that this would be the proper thing to do, and he could find a purchaser for it.

7. The Tax Court based its holding that the properties were held primarily for sale on the fact that the petitioners sold over twice as many leases as they drilled. This is not a proper test for determining whether the properties were held primarily for sale. TAYLOR v. COMMISSIONER, 76 Fed. (2d) 904; WELD v. COMMISSIONER, 31 B.T.A. 600; TROST v. COMMISSIONER, 34 B.T.A. 24.

8. The statute requires that the property must be held primarily for sale to customers. The only customers that petitioner had were the major oil companies for which he purchased leases as his chief occupation. The properties were not held by petitioner for sale to the oil companies, and none of them were sold to the oil companies. Hence, there were no sales to customers, as required by the statute.

9. The petitioner had the burden before The Tax Court of showing that the properties were not held primarily for sale to customers, as determined by the respondent. Petitioners thus had the burden of proving a negative. The only way this burden could have been met was by showing the purpose and intention the petitioners had in mind in acquiring and holding the properties. The undisputed evidence showed that petitioners purchased the properties for in-

vestment purposes; that at the time of acquisition they did not know whether they would realize on their investments by drilling the properties and producing and selling oil, or by selling them at a price in excess of cost. The uncontradicted testimony further showed that in disposing of the properties or in drilling them, petitioners were governed entirely by events and changes which occurred after they were acquired. In view of the evidence, none of which was controverted or rebutted, it was unreasonable to assume, as did The Tax Court, that the properties were held primarily for sale to customers. Such holding does violence to the language of the statute and defeats the object which Congress had in mind in enacting it, which was to facilitate the sale of properties which had been held for a long period of time, and which had greatly appreciated in value.

Argument

(POINT 1)

The single question presented by this petition is whether certain oil and gas leases, royalty interests, and two parcels of fee lands, which the petitioners sold in the years 1938 and 1939, were held by them primarily for sale to customers in the ordinary course of their trade or business under Section 117(a)(1) of the REVENUE ACT OF 1938.[1]

If the properties were held primarily for sale to customers in the course of a trade or business, all of the gain is recog-

[1] Sec. 117(a)(1) Capital Assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23(l);

nizable for tax purposes. If the properties were not so held, only 50 per cent of the gain is recognizable because, with the exception of three of the properties, all of them had been held for more than twenty-four months when sold. In three instances, the properties had been held from between eighteen to twenty-four months and the gain on these sales is recognizable to the extent of 66 2/3 per cent (R. 75-76 and 92), Sec. 117(b).[2]

The provision for taxing capital gains at a flat rate of tax rather than at the normal and surtax rates to which ordinary income is subjected originated in Section 206 of the REVENUE ACT OF 1921. Prior to that time, capital gains were taxed at the normal and surtax rates to which all income was subjected. By Section 206, taxpayers were given the option of paying a tax of 12½ per cent on their capital gains or the regular normal and surtax, if lower. The capital gains and loss provisions were reënacted in one form or another in all subsequent revenue laws. The purpose of the capital gain provision was to encourage the sale of farms, mineral properties and other capital assets by relieving taxpayers from the burden of excessive and prohibitive surtaxes when a capital asset which has increased in value over a period of years is disposed of in a single year.[3]

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[2] Sec. 117(b) Percentage Taken Into Account.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income;

100 per centum if the capital asset has been held for not more than 18 months;

66 2/3 per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

[3] "The sale of farms, mineral properties, and other capital assets is now seriously retarded by the fact that gains and profits earned over a series of years are under the present law taxed as a lump

Remedial statutes are to be construed liberally in favor of taxpayers to give them the relief they were intended to provide and doubts are to be resolved in their favor. BONWIT-TELLER & COMPANY v. UNITED STATES, 283 U.S. 258, 263, 75 L. Ed. 1018; U. S. v. MERRIAM, 263 U.S. 179, 187, 68 L. Ed. 240; BOWERS v. NEW YORK & ALBANY LIGHTERAGE Co., 273 U.S. 346, 350, 71 L. Ed. 676; U. S. v. UPDIKE, 281 U. S. 489, 74 L. Ed. 984; BURNET v. NIAGARA FALLS BREWING COMPANY, 282 U.S. 648, 654, 75 L. Ed. 594; and BURNET v. MARSTON, 57 Fed. (2d) 611.

The petitioners sold mineral properties (oil and gas leases, royalty interests and interests in fee owned lands) which was one of the objects the capital gain provisions were intended to encourage. The petitioners held these properties for more than two years in most instances. All the gain did not accrue in one year, but it was all realized in the year of the sale. The petitioners will be subjected to prohibitive and excessive surtaxes unless the gain on the sales of their properties is treated and taxed as "long-term capital gain." The petitioners therefore fit squarely into the class of taxpayers as to which the capital gain provisions were intended to af-

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sum (and the amount of surtax greatly enhanced thereby) in the year in which the profit is realized. Many such sales, with their possible profit taking and consequent increases of the tax revenue, have been blocked by this feature of the present law. In order to permit such transaction to go forward without fear of a prohibitive tax, the proposed bill, in Section 206, adds a new section (207) to the income tax, providing that where the net gain derived from the sale or other disposition of capital assets would, under the ordinary procedure, be subjected to an income tax in excess of 15 per cent, the tax upon capital net gain shall be limited to that rate. It is believed that the passage of this provision would materially increase the revenue, not only because it would stimulate profit-taking transactions but because the limitation of 15 per cent is also applied to capital losses. Under present conditions there are likely to be more losses than gains." (Excerpt from House Report No. 350, Ways and Means Committee on the Revenue Act of 1921, 67th Congress.)

ford relief, and under the authorities cited above, the statute is to be construed liberally in their favor in order to provide the relief it was intended to afford.

The Tax Court did not construe the statute liberally in the petitioners' favor. Although indicating in its opinion that there was a doubt as to whether the properties were held primarily for sale, the court permitted the presumption of correctness which ordinarily attaches to the respondent's determination to balance the scales in his favor. A relief statute being involved, the doubt or doubts, if any, should have been resolved in favor of the petitioners.

(POINT 2)

The Circuit Court of Appeals said in its opinion upholding the decision of The Tax Court "since it is admitted that the taxpayers were in the business of buying and selling properties, at least a substantial portion of the properties must have been held primarily for sale in the ordinary course of business" (R. 104). *The petitioners did not make such admission.* What was admitted was that "respondent has ably demonstrated that these petitioners were engaged in a trade or business." This statement was made in petitioners' reply brief. The Tax Court quoted the statement in its opinion (R. 43) and stated that petitioners contended that "the properties in question were purchased for investment and therefore were not held for sale." The admission in the reply brief was made on the basis of the statement of the witness (Greene) appearing on page 55 of the record. He testified that he drilled a certain well because he "thought it was a pretty good shot for oil;" that this was "true as to all wells he ever drilled;" and that he "was in that business." There is, however, no justification in the record for the statement in the opinion of the Circuit Court of Appeals that petitioners admitted being in the business of buying and selling properties.

The supposition that petitioners did make such an admission was the foundation for the conclusion reached by the Circuit Court that the properties sold during 1938 and 1939 "must have been held primarily for resale in the ordinary course of business." Since the decision of the Circuit Court is based on an erroneous assumption, it should not be allowed to stand by this Court.

(POINT 3)

The Circuit Court of Appeals further stated in its opinion that The Tax Court was required to draw an inference as to the ultimate fact from the circumstantial evidence relevant thereto, and that the burden was on the petitioners to show that the inference so drawn was not warranted by any substantial evidence. (Citing DOBSON v. COMMISSIONER, 64 S. Ct. 596.) The petitioners met such burden. It was shown that Greene, the only witness at The Tax Court hearing, testified that throughout the years he had been endeavoring to obtain for himself some oil producing properties; that in purchasing leases and royalty interests he did not do so with the purpose or motive of resale; that he did not know exactly what he might do with a particular piece of property when he bought it; that he bought the properties with the idea in mind that he might drill himself if production got close; that he might sell a lease if development on offsetting or nearby properties indicated to him that such was the proper course to take and he could find a buyer for the lease; that he might forfeit the lease by not paying the rental if developments indicated that this should be done; or that he might "farm out" a lease or leases for others to develop. Greene further testified that disposition or use of a property was always governed by events and changes which occurred after the property had been acquired. Greene's testimony completely negatived and dispelled any idea that the prop-

erties were his stock in trade and that they were held primarily for sale to customers in the course of a trade or business. No countervailing or rebutting evidence was offered by the respondent. It is therefore respectfully submitted that the finding of The Tax Court that the properties in question were held for resale was not supported by the evidence and its decision should have been reversed and the case remanded on the appeal below.

(POINT 4)

Moreover, the Circuit Court of Appeals should not have limited its consideration of the case to whether there was any evidence to support the findings of The Tax Court. The Circuit Courts of Appeal are given the power, under Section 1226, Title 26, U.S.C.A., in reviewing appeals from the Board of Tax Appeals (now The Tax Court) "to affirm or, if the decision of the Board is not in accordance with the law, to modify or reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require." The petitioner (J. L. Greene) was the only witness in this case before The Tax Court. His testimony was not contradicted and there is no conflict or controversy over the facts; therefore, as pointed out by JUDGE WALLER in his dissenting opinion, the problem before the court was to take a given and admitted state of facts and determine what the law was under the facts. Consideration of the problem required a construction of Sec. 117 as applied to the facts. The question, therefore, was one of law, or at least a mixed question of law and fact. This being so, the Circuit Court of Appeals not only had the right to review the decision of The Tax Court, but it was its duty to do so under Section 1226 and determine whether it was in "accordance with law."

The Circuit Court of Appeals for the Eighth Circuit dealt with a quite similar situation in the case of WASHBURN v.

COMMISSIONER, 51 Fed. (2d) 949. The question was whether a net loss which the taxpayer had sustained resulted from the operation of a trade or business regularly carried on by him. The Board of Tax Appeals held that the loss was not a loss arising from business. The taxpayer appealed and the Commissioner contended that there was substantial evidence to support the Board's findings and that the decision should be affirmed. In overruling this contention, the Eighth Circuit Court of Appeals said that "the Board here found certain primary facts and drew therefrom the ultimate conclusion that petitioner was not regularly engaged in trade or business under Section 204(a) (REV. ACT OF 1921). This required a construction of Section 204(a) as applied to the facts. The question here is a mixed one of law and fact." The Court further stated that while there may be some degree of finality in a finding of fact by an administrative body, *such finality cannot take from the courts the power to construe a statute and determine whether it covers such a situation as the facts present.*

In HELVERING v. RANKIN, 295 U.S. 123, this Court, speaking through MR. JUSTICE BRANDEIS, stated that unless the finding of the Board (The Tax Court) involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board. This statement implies that if the finding of The Tax Court does involve a mixed question of law and fact, the Circuit Court of Appeals may, upon appeal from the decision of The Tax Court, properly substitute its judgment for that of The Tax Court, and we do not understand that this principle was overruled by this Court in its more recent decision in the DOBSON case.

The question presented to the Circuit Court of Appeals was whether the properties were held by the petitioners for sale to customers in the course of their trade or business. This, as has been shown, was a question of law. Under the authori-

ties cited, the court was not required to limit its consideration of the case to the question of whether there was any support in the evidence for The Tax Court findings; it should have reviewed the question of law presented.

(POINT 5)

It was stated in the majority opinion of the Circuit Court of Appeals that the properties sold were of comparatively recent acquisition and not one of them was productive of any income at the time it was sold. It is true that the properties sold during the taxable years had not been developed to the point of production but this is no proof that they were held primarily for sale and not for investment purposes. Many taxpayers invest their funds in unimproved real estate in the expectation that it will increase in value without any immediate prospect of the property producing income. The record shows that of the thirty-seven different parcels of property sold by the petitioners in 1938 and 1939, thirty-four had been held for more than two years at the time of sale and some of them had been held as long as five years before they were sold (R. 42). It cannot be said, therefore, that the properties sold were of "comparatively recent acquisition", but even if this were true it would be no proof that the properties were held for resale. The motive and purpose in purchasing a property is the controlling factor rather than the length of time the property is held before it is sold. The petitioner testified categorically that he purchased the properties for investment, but at the time of acquisition he did not know what disposition of them he would make. Persons purchasing goods, wares and merchandise for their stock in trade do so with the expecation of a quick turnover and do not customarily hold their goods in stock for two, three, four or five, years, as was the case with most of the properties acquired by the petitioners. If the length of time a prop

erty is held has anything to do with the purpose for which it is held, the fact that the petitioners held practically all the properties which they sold in 1938 and 1939 for more than two years would indicate that the properties were not held for resale.

(POINT 6)

The Circuit Court further stated in the majority opinion that the substance of petitioner's testimony was to the effect that he had neither the capital nor the inclination to hold for investment more than a chosen few of all the properties held. As previously stated herein, Greene testified that he purchased the properties for investment purposes, but at the time the acquisitions were made he did no know how he would realize on the investments. He stated that along with his brokerage business, he was attempting to build up some oil producing properties for his own account and that if he thought there was a "good shot" for oil on a given lease which he had purchased he would drill it himself, but that he also would sell a given lease if nearby developments suggested to him that it should be sold and he could find a purchaser for it. There is nothing in the record to support the statement of the Circuit Court of Appeals that petitioners had neither the inclination nor the capital to hold more than a chosen few of their properties for investment purposes.

(POINT 7)

The Tax Court held that since the petitioners sold over twice as many properties as they drilled there was "a great preponderance of probability in favor of a disposition by sale over retention for investment purposes." This, we think, was pure guess work on the part of The Tax Court. It is undoubtedly true that there is not an oil company in the country that drills one-tenth of the oil and gas leases that

it acquires. There are vastly more leases sold, abandoned, or farmed out by oil companies than are drilled. Simply because a given operator sells more leases than he drills himself is no criterion of the fact that his properties are *held primarily for sale*. The record shows that during the years 1938 and 1939, petitioners abandoned a great number of their leases, and if the volume of transactions has anything to do with the purpose for which the properties were held, under the theory advanced by The Tax Court it would be arguable that petitioners held the properties for the purpose of abandonment.

The volume of sales test applied by The Tax Court in determining that the properties in controversy were held primarily for sale in the course of a trade or business is not now considered to be a fair yardstick for determining such question. In HIGGINS v. COMMISSIONER, 312 U.S. 212, the taxpayer's transactions in the stock and bond market were voluminous and the amounts involved were large, yet The Tax Court held that the taxpayer was not engaged in buying and selling securities as a business, and this Court affirmed that determination.

Another case in point is TAYLOR v. COMMISSIONER, 76 Fed. (2d) 904, (C.C.A. 2nd). This is one of the cases on which we rely as establishing a conflict with the decision herein. Taylor was a lawyer. He traded extensively in securities as a sideline. During the taxable year before The Tax Court, he realized a gain of over $490,000 from the sale of shares of stock. The Tax Court found, on the basis of the volume of sales made by the taxpayer, that he was in the security business, and that the stocks sold during the year were held primarily for sale. The Circuit Court of Appeals for the Second Circuit held that the mere amount and value of the shares of Public Service Corporation, or the stocks in which the taxpayer dealt, did not make him a trader or his transactions in corporate securities a business in the purchase of stocks held primarily for sale.

The situation in the present case, except for the kind of property dealt in, is very similar to that involved in the cases of WELD v. COMMISSIONER, 31 B.T.A. 600, and TROST v. COMMISSIONER, 34 B.T.A. 24. In the first mentioned case, the taxpayer was a member of a stock brokerage firm which was engaged in the business of buying and selling securities for others. Independently of such business, the taxpayer bought and sold securities on his own account on a very substantial scale. The Commissioner contended that the taxpayer's total volume in purchases and sales of securities during the taxable year exceeded $1,000,000, and that either purchases or sales were made during most every day of the year. The question before the Board was whether the securities sold during the year were held primarily for sale in the course of a trade or business and thus excluded from the capital gain provision. In holding that the securities were not held primarily for sale and that the gain on the sales constituted capital net gain, the Board said:

> "Although it is undoubtedly true that the petitioner was ready to sell any of his investments when the market quotations would show him a satisfactory profit, the evidence does not show that these securities were held 'primarily for sale in the course of' petitioner's trade or business, or in fact that the petitioner individually had a trade or business of buying and selling securities. His purchases and sales were such as might be made by any investor or retired business man. Such a person would not ordinarily be regarded as engaged in a business of buying and selling securities. *To regard the petitioner's purchases and sale of securities as a trade or business within the contemplation of the statute does violence to the very language of the statute and to the purpose which Congress had in mind in providing for the taxing of gains from the sale of property held more than two years at the capital gain rate. That object was to facilitate sales of property which had been held for*

> *a long period and which had greatly appreciated in value.*" (Italics supplied.)

and further that

> "We are of the opinion that a professional man, such as a lawyer or a doctor, who invests his surplus income in the purchase of stocks or other property with an idea of sale at a future date at a profit is not ordinarily to be regarded as holding such shares primarily for sale in the course of his trade or business. We think that the same observation applies to the petitioner at bar. He was not engaged as an individual in a trade or business of buying and selling securities; consequently, he could not be regarded as holding them primarily for sale in the course of his trade or business."

In the TROST case, the taxpayer was also a member of a brokerage firm which was engaged in buying and selling securities. He also dealt in securities on a very extensive scale for his own account. During the taxable year, Trost sold stocks at a profit of over $107,000 which he reported as capital gain. The Commissioner took the position that the stocks were held by Trost primarily for sale in the course of his trade or business, and that the profit was ordinary income rather than capital gain. The Board held, notwithstanding the number of sales, and the frequency and continuity with which they were made, the stocks in controversy were not held primarily for sale in the course of a trade or business, and the profit was capital gain, as contended by the taxpayer.

In view of the holdings in the cited cases, it is evident that The Tax Court erred in inferring from the fact that the petitioners sold over twice as many leases as they drilled, that the properties sold by them during 1938 and 1939 were held primarily for sale to customers in the ordinary course of a trade or business.

(POINT 8)

The statute requires that the sales be made to *customers*. The Tax Court defined the word very broadly in its opinion. It said that any person whom the petitioners could find to make a sale was a customer within the meaning of the word, as used in the statute. There is no reason to believe the Congress used the word "customer" in the statute in other than its ordinary, everyday sense and understanding. The preferred definition given by WEBSTER'S NEW INTERNATIONAL DICTIONARY is "one who regularly or repeatedly makes purchases of, or has business dealings with a tradesman or business establishment; one who customarily has dealings with a business establishment." The purpose in inserting the word "customers" in the statute was to prevent tax avoidance by making it impossible for a stock speculator, trading on his account, to contend that he was not subject to the limitations imposed by Sec. 117.[4] There is, therefore, no reason to assume that Congress used the word "customer" in other than its ordinary sense and meaning. As pointed out by JUDGE WALLER in his dissenting opinion, the only customers which the petitioner regularly did business with were the major oil companies for which he bought leases as a broker and none of the sales in controversy was made to such companies. The persons to whom petitioner made a casual sale of a lease or a royalty interest, or a fee owned property, were no more his customers than was he a customer of the persons from

[4] Report—Conference Committee (73d Cong., 2d Sess., H. Rept. 1385)—Amendment No. 66: The House bill excluded from the definition of "capital assets" property held primarily for sale in the course of the taxpayer's trade or business. The Senate amendment confines the exclusion to property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business, thus making it impossible to contend that a stock speculator trading on his own account is not subject to the provisions of Section 117. The House recedes (p. 22).

whom he acquired the properties. No one in the oil industry looks upon the person to whom he happens to sell a lease or other interest in an oil property as a customer, and no one buying a lease considers that he is a customer of the seller. We submit, therefore, that The Tax Court reached an erroneous conclusion in its holding that any person to whom petitioner happened to sell a property was a customer within the meaning of the statute.

(POINT 9)

Respondent determined that the properties were held by petitioners primarily for sale to customers in the ordinary course of a trade or business. In The Tax Court, the burden was on the petitioners to show that respondent's determination was wrong. They were thus put to the necessity of proving a negative. They met this burden by showing that the properties were purchased for investment purposes; that at the time they purchased the properties they could not foretell what might be done with them in the future; that they might drill them for oil themselves or "farm them out" for others to drill; or they might sell a lease if the price was right and developments indicated that to sell was the proper thing to do; or that they might abandon some of the leases if it seemed more appropriate rather than pay the rentals. The evidence showed that everything depended on what future developments and exploratory work on offsetting or nearby properties disclosed. *If the showing made by the petitioners in this proceeding did not prove that the properties were not held primarily for sale to customers in the course of a trade or business, then no taxpayer can hope to overcome a determination by the respondent that properties are held for such purpose.* The only evidence which lends any credence whatever to The Tax Court's findings is the fact that the petitioners did sell eighteen properties in 1938 and nine-

teen in the year 1939. We submit that this is not any proof that the properties were held primarily for resale because, as stated in the decision of The Tax Court in WELD v. COMMISSIONER, supra, any owner will sell his investments when he can do so at a satisfactory profit, and standing alone, the fact that an investor makes frequent sales does not prove that he is a dealer, or that the property sold represents stock in trade. The sales made by the petitioners were such as might be made by any oil company engaged in the business of producing and selling oil. To regard the properties sold by the petitioners as being their stock in trade, and the sales as placing them in the business of buying and selling leases, et cetera, does violence to the language of the statute and to the purpose which Congress had in mind in enacting the statutory provisions relating to taxation of capital gains.

Conclusion

It follows that the petition should be granted and that upon consideration of the cause upon the merits the decision of the Circuit Court of Appeals should be reversed.

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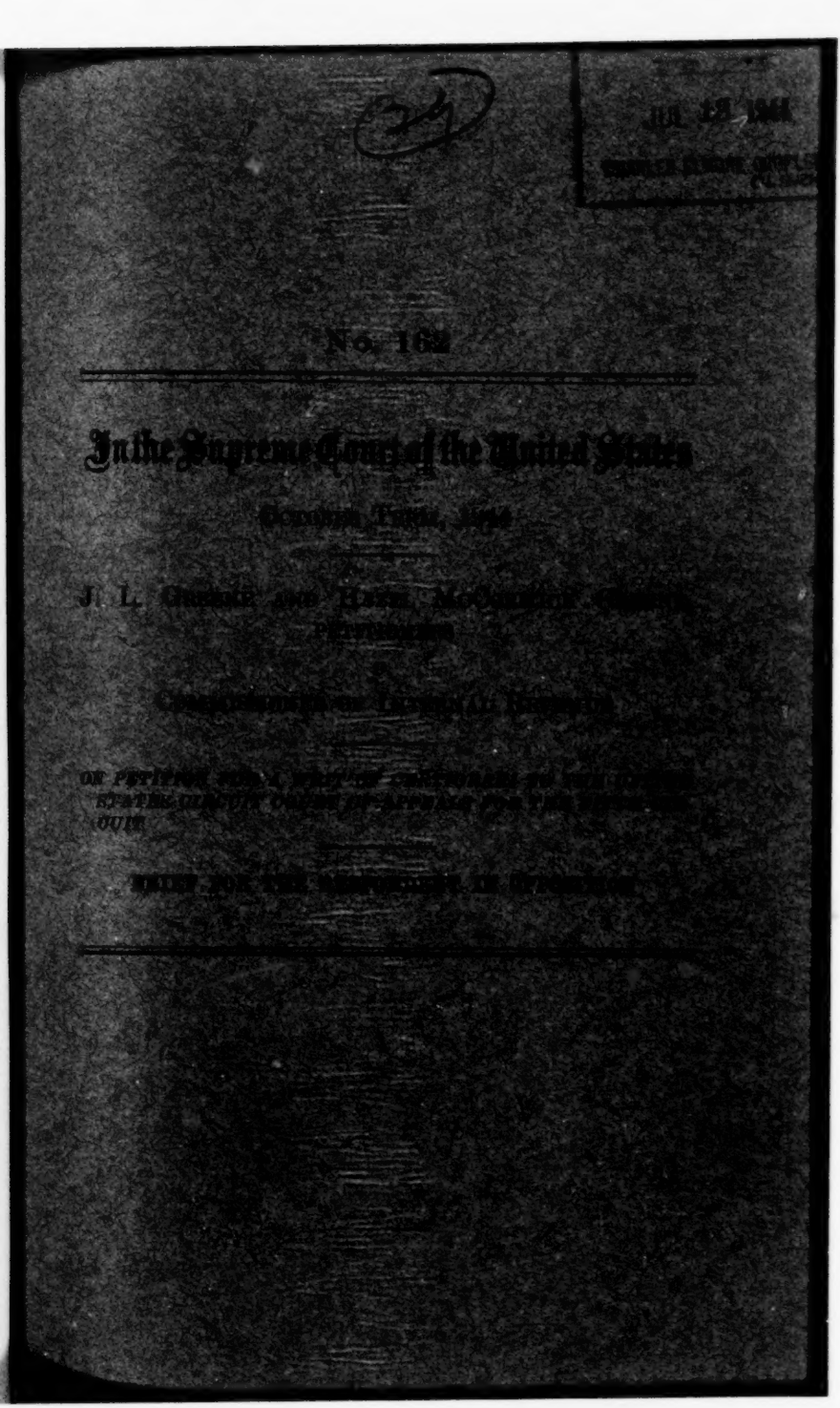

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 162

L. GREENE AND HAZEL MCCORMICK GREENE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 39–45) is not reported. The opinion of the Circuit Court of Appeals (R. 100–105) is reported at 141 F. 2d 645.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1944 (R. 105). The petition for a writ of certiorari was filed on June , 1944. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below properly refused to disturb the Tax Court's conclusion that the taxpayer held oil and gas properties primarily for sale to others in the course of his business within the meaning of Section 117 (a) (1) of the Revenue Act of 1938 and the Internal Revenue Code.

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (g) *Capital Losses.*—
>
> (1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.
>
> (2) *Securities Becoming Worthless.*—If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this title, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.
>
> * * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this title—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l);

* * * * *

(3) *Short-Term Capital Loss.*—The Term "short-term capital loss" means loss from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such loss is taken into account in computing net income;

* * * * *

(d) *Limitation on Capital Losses.*—

* * * * *

(2) *Other Taxpayers.*—In the case of a taxpayer other than a corporation, short-term capital losses shall be allowed only to the extent of short-term capital gains.

* * * * *

Corresponding provisions of the Internal Rev
enue Code are identical.

STATEMENT

The statement of facts set forth below is take
from the memorandum opinion of the Tax Cou
(R. 40–43):

Taxpayers in this consolidated action are hus
band and wife, who, during the years 1938 an
1939, were domiciled in the State of Texas. The
filed separate individual income tax returns wit
the Collector of Internal Revenue at Dalla
Texas, on the community property basis. Th
husband, J. L. Greene, was the manager of th
community and for convenience will be herein
after referred to as taxpayer. He has resided i
Midland, Texas, for approximately 13 years
When he first moved to Midland he was an oi
scout for the Shell Oil Company but due to th
depression was laid off in 1931. Since that dat
he has engaged in the oil business at Midlan
where he has maintained an office for a greate
portion of the time. (R. 40.)

Taxpayer has acted as a broker, buying an
selling oil and gas properties for others and re
ceiving compensation for such services. He hold
a brokerage license from the State of Texas. I
operations of this sort, the purchasers, usuall
oil companies, provide necessary funds, and th
purchases are made by taxpayer on behalf of th
companies. Taxpayer received as commission
for such services the sums of $12,387.06 an

$5,185.63 for the years 1938 and 1939, respectively. In 1938, nine separate transactions gave rise to the commission income and in 1939 eight separate transactions were involved. (R. 40–41.)

Taxpayer's returns for the years in question disclose income from producing oil properties in the amounts of $354.59 for 1938 and $51.28 for 1939, dividends of $300 for each of those years, and interest of $10 for 1938 (R. 41).

Aside from his activities as a broker, taxpayer acquired and dealt with oil properties on his own behalf. In 1933 and thereafter, he purchased for himself a number of leases and mineral interests, and at the time of the trial he owned at least 100 such properties. Taxpayer was desirous of accumulating some producing properties. He had had some wells drilled over a period of years and was definitely in the oil business during the years in question. He had not acquired and did not have any properties that he would not sell at any time if he thought he could obtain what they were worth. (R. 41.)

Taxpayer was widely known among oil men, landowners, and individuals in the general area of Midland, Texas.[1] He spent most of his time

[1] The taxpayer admitted that (R. 59) he was generally known among the oil men in the Midland area of Texas and that (R. 62) his name appeared on blotters and certain advertisements around Midland "as an oil lease dealer or something of that nature." Although the taxpayer denied authorizing the printing of the blotters, this seems to be some indication of how he was regarded in the community.

at his office in Midland unless he was out for the purpose of acquiring oil and gas properties. People knew that he had an office where he transacted business. In the sale of the properties in question, some of the parties came to him and he went to others. He did not utilize any particular method of publicizing the fact that he had oil and gas properties for sale. (R. 41.)

None of the property sold in 1938 and 1939 had been drilled or developed by taxpayer. He was not financially able to develop some of the leases he owned and because of the nature of many of them, he did not want to do so. Taxpayer has drilled 11 wells. He has abandoned some properties because they became worthless. (R. 41–42.)

In 1938 taxpayer sold 18 oil and gas leases and interests (including one fee property) at a gross profit of $22,057.20. These 18 properties had been acquired as follows: one in each of the years 1933 and 1934, five in 1935, three in each of the years 1936 and 1937, and five in the year 1938. (R. 42.)

In 1939, taxpayer sold 19 gas and oil leases and interests (including one fee property) at a profit of $15,152.41. These 19 properties had been acquired as follows: one in 1934, two in 1935, four in 1936, three in 1937, four in 1938, and five in 1939. They and the properties which were sold in 1938 were non-producing. (R. 42.)

When the properties were acquired, taxpayer did not know whether they would be held for investment or speculation, drilled, "farmed out" for others to drill, traded or otherwise disposed of, forfeited or abandoned (R. 42).

Taxpayer pursued the policy of buying "wildcat" properties, drilling some of them, watching drilling and developing activities in their vicinity, holding certain properties, selling others when his best judgment so dictated, and abandoning properties when they became worthless (R. 42).

The Tax Court concluded that the activities of taxpayer involving the acquisition and sales of oil and gas properties constituted a trade or business in the years in question. He incurred and paid ordinary and necessary business expenses in connection with his trade or business of $2,701.47 for 1938 and $1,968.68 for 1939. (R. 42.)

Having found that the taxpayer held the oil properties primarily for sale (Sec. 117 (a) (1)), the Tax Court concluded (R. 44) that the business expenses were deductible but that a capital loss, which admittedly had been sustained, could not be offset against the business profits, for such profits constituted ordinary income and not capital gain, since the properties sold were not "capital assets" as defined in Section 117 of the Revenue Act of 1938 and the Internal Revenue Code. The Circuit Court of Appeals affirmed (R. 105).

ARGUMENT

The circuit court of appeals properly refused to disturb the conclusion of the Tax Court that (R. 42) the activities of the taxpayer in acquiring and selling oil properties constituted a trade or business in the years here in question and that (R. 44) the oil properties were held primarily for sale to others within the meaning of Section 117 (a) (1) of the Revenue Act of 1938 and the Internal Revenue Code, *supra*, p. 3. The Tax Court examined the evidence and, after balancing and weighing the factors involved, concluded that (R. 43) there was "a great preponderance of probability in favor of a disposition by sale over retention for investment purposes." Since the sales activities here clearly predominated the investment activities with respect to the oil properties held, and since the taxpayer introduced no evidence to show a specific intent with respect to the properties sold during the years in question, the Tax Court correctly concluded that the properties were being held "primarily" for sale to others within the meaning of the statutes.

The case presents no broad question of general importance, as is asserted (Pet. 6–7), but involves essentially a factual situation, and any decision would necessarily be restricted to the particular facts presented. In *Higgins* v. *Commissioner*, 312 U. S. 212, 217, this Court pointed out that such a question "requires an examination of

the facts in each case." See also *Oliver* v. *Commissioner,* 138 F. 2d 910 (C. C. A. 4th); *Ehrman* v. *Commissioner,* 120 F. 2d 607 (C. C. A. 9th), certiorari denied, 314 U. S. 668; *Commissioner* v. *Boeing,* 106 F. 2d 305 (C. C. A. 9th), certiorari denied, 308 U. S. 619.

The taxpayer attacks (Pet. 8) the assumption of the court below that he was admittedly engaged in the business of buying and selling oil properties. Without going into the intended scope of the taxpayer's admission in this respect (R. 60), it seems sufficient to point out that the Tax Court specifically (R. 42) held that the taxpayer's activities in acquiring and selling oil properties "constituted a trade or business in the years in question." In the final analysis, what the court below did was to rule that this and other findings of the Tax Court were warranted by the evidence (R. 102).

Cases such as *Taylor* v. *Commissioner,* 76 F. 2d 904 (C. C. A. 2d) (Pet. 8), involving repeated purchases and sales of securities by a practicing attorney, present no basis for the writ. In *Higgins* v. *Commissioner, supra,* this Court sustained the view of the Commissioner and both tribunals below that personal investment activities in securities did not satisfy the statutory concept, although similar activities in handling, renting and selling realty had been conceded (p. 218) to constitute a business.

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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